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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 613

ADAM CLAYTON POWELL, JR.,

Petitioner,

v.

ESTHER JAMES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

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To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Adam Clayton Powell, by his attorneys, Henry R. Williams and George D. Covington, Esquires, respectfully petitions that a Writ of Certiorari issue to review the mandate of the Court of Appeals of New York entered on July 10, 1964.

Opinions Below.

The Per Curiam opinion of the Court of Appeals is to be found in the appendix to this petition. This is the final judgment in the State of New York, where judgment was entered for the plaintiff, affirming the judgment of

the Appellate Division of the Supreme Court, First Judicial Department, which rendered a memorandum decision for a new trial unless the plaintiff agreed to a reduction of the jury's grossly excessive verdict to $11,500.00 as compensatory damages and $35,000.00 as punitive damages.

Jurisdiction.

The judgment of the Court of Appeals of New York was dated July 10, 1964. The jurisdiction of this court is invoked under the Act of June 25, 1948 c. 646, 62 Stat. 929, 284, S. C. 1257(3), since the rights of the petitioner under the United States Constitution are here involved. The Court of Appeals of New York is the highest Court of that state.

Questions Presented.

A. Did the Court of Appeals of New York err in affirming the judgment of the lower Court which held that the state libel law may be applied to limit the freedom of speech of a member of the United States Congress where such expressions are in the pursuit of his duties of public office.

B. Is a member of the United States Congress privileged for statements made pursuant to the performance of his public duties.

Statement of the Case.

Petitioner is a Congressman for the State of New York, Sixteenth Congressional District and is Chairman of the House Committee On Education And Labor, as he was at the time of the utterance of which Respondent complained.

For sometime prior to the evening of March 6th, 1960, the Petitioner had made a series of speeches in the United States Congress with regard to collusion between gangsters and the Police Department of the City of New York, the corruption of children by the use of number of collection of neighborhood groceries for "number drops". All of the speeches were printed in the Congressional Record, and some contained reference to Respondent as a "bag woman" for the police of the Department. As a result the speeches were widely circulated and created newspaper and editorial comment.

The speeches referred to were the result of letters addressed to public officials, copies of which were sent to Petitioner in his official capacity. In essence, the first letter referred to stated that the writer, subsequently identified as Halston Patterson, went to the office of one John Walsh, Supervision Assn. Chief Inspector of the Police Department, and related to the police officers that Respondent was being paid by one Frederick, Patterson's partner, to prevent Respondent from exposing their gambling activities.

Patterson gave the name of other gamblers who were paying the Respondent for the same purpose. The letter stated that the "little gamblers" were called in by the police and admitted that Respondent extorted money from them under threat of exposure.

The first letters stated furthermore that although an investigation was undertaken it was later frustrated by Assistant Chief Inspector James Nidds, who, the letter alleged, was himself involved in sheltering the Respondent on account of Nidds' employment of respondent as an informer against gamblers.

A second letter stated that the "little gamblers" were convinced that Nidds, the police inspector, was attempting

to destroy them because of their competition with a large crime syndicate. Nidds, the letter alleged, protected the crime syndicate against exposure.

Petitioner appeared on the television program on March 6, 1960, in response to an invitation (R. 250), without any fee (R. 89), without previous rehearsals (R. 251-2), and without the usual publicity because he was a last minute substitute for Senator George Humphreys (R. 249). The program was carried only over Channel 13, New York City, which is generally designated as an educational station with a limited audience regardless of the viewing time.

In the unrehearsed interview, the moderator of the program queried Petitioner upon his speeches in Congress and his "war" on corruption in the Police Department of the City of New York. In the course of the said interview Petitioner admitted his speeches concerning policy, graft, the syndicate and policy, and police corruption for the past three months, and stated, as set forth 19-21 of the record, as follows:

> "Well there is a woman named Esther James who is a bag woman for the Police Department in Washington, and the gamblers themselves made a complaint in person in August to the Police Department about her and nothing was done. They sent a letter to Inspector Walsh on September 9th of last year complaining about her and in the letter they said—and I quote from the letter which was sent to the New York State Crime Commission—I have a copy of it—that Esther James said: "You're not going to be able to touch me because if I tell the truth, then all of these policemen and the brass that have been getting this payoff that I collect from them, they will be then prosecuted for income tax evasion—so they are not going to do anything with me, and its just that simple."

Respondent voluntarily identified herself as the Esther James mentioned in the foregoing quote from the television program, although submitting no proof of the fact, and alleged that she was defamed and damaged by the comment on the television program, but made no claim for damages by reason of the prior utterance of the same remark in the United States Congress and in the Congressional Record.

In his second and third affirmative defenses Petitioner alleged that the utterances by him on the said television program were an extension of his Congressional Record and was in the nature of a report made, bona fide and without malice, to his constituents and the interested members of the general public of similar remarks previously made in Congress, that the utterances were general observations concerning the state of organized gambling, and related corruption of some member of the Police Department of the City of New York, and were made in discharge of Petitioner's duty to disclose to the general public conditions which vitally affected their welfare.

The Respondent has admitted that the remarks of which she complains were previously set forth in the Congressional Record, and that as a result thereof the Respondent was subjected to inquiry by several commissions, yet she has restricted the trial solely to the utterances made on television.

The Respondent also admitted that she had never met and did not know the Petitioner (R. 319); that she had been shot because of her interest in gambling (R. 770); that she had been convicted of a crime on at least two occasions, one of which was an assault with a dangerous weapon (R. 392-3); and that she had lied about such convictions on her application for naturalization (R. 402, *et seq.* and 423, 426).

In support of her claim for damages, the Respondent produced character witnesses, none of whom had dis-

cussed her character with other members of the community (R. 144, 157, 179, 192 and 196), and loss of earnings as an apparent part-time maid (R. 3[illegible]7). She produced no proof that she was the person indicated in the utterances complained of by her, other than the apparent similarity of name.

Petitioner in his testimony in the Examination Before Trial taken by the Respondent stated that he did not know and had never met Respondent, and that he had no malicious motive in making allegedly slanderous utterances (R. 86).

Respondent offered no evidence of malice on the part of Petitioner in making the alleged slanderous remarks.

Reasons for Granting the Writ.

A. The judgment handed down by the highest Court of the State of New York limits the freedom of expression of a citizen and a member of the United States Congress and is therefore unconstitutional as a violation of the First and Fourteenth Amendment. It is clear that the action of the State is here involved since, though this is a law suit between private parties, the New York Courts have applied a state rule of law which imposes invalid restriction upon Petitioner's constitutional freedom of expression. *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 265.

This Court has decided no case where it has "sustained the use of libel law to impose sanctions upon expressions critical of the official conduct of public officials" *New York Times Co.* v. *Sullivan, supra,* 268. Moreover, this Court has made it clear that it "retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel. *Beauharnais* v. *Illinois,* 343 U. S. 250, 263.

This Court has stated that the constitutional safeguard of free speech "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *U. S.*, 354 U. S. 476, 484.

This Court has pointed out "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open and that it may well include the vehement, caustic, and sometimes unpleasantly sharp attacks on government public officials." *New York Times Co.* v. *Sullivan, supra,* 270.

A state rule of law is not saved by its provisions of defenses for libel where the defenses are not an adequate safeguard to freedom of expression. *New York Times Co.* v. *Sullivan, supra,* 278.

Petitioner in his brief before the Court of Appeals of New York raised the defense of qualified privilege against libel. Since the Court of Appeals decided against the petition it must be inferred that the Court of Appeals did not sustain the defense in this case.

In view of the absence of a legal defense to protect Petitioner in circumstances in which Petitioner must speak freely in order to hold his public office responsibly, the defenses provided by this state law as applied in this case by the Court of Appeals of New York are not sufficient.

The facts did not support a finding of actual malice. The records indicate that Petitioner is a member of the United States Congress; that the allegedly slanderous statements were previously made by him on the floor of the U. S. House of Representatives; that he did not know the Respondent; that the statements made were matters of vital public interest and concern; that they were statements which Petitioner had a duty to the public to disclose; that the statements were made in good faith and in dis-

charge of his duty to disclose such corrupt conditions to the public and made without any malice to the Respondent; that the program was used as a means to carry out public responsibility by calling the attention of the public to conditions affecting their welfare.

B. A Member of the United States Congress is privileged for statements made pursuant to the performance of his public duties, *United States* v. *Thomas Johnson*, ... U. S. Court of Appeals, 4th Cir., ...; Article 1, Section 6, U. S. Constitution. The Constitution states as follows:

> "The Senators and Representatives shall receive a Compensation for their services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; *and for any Speech or Debate in either House, they shall not be questioned in any other Place.*" (Emphasis supplied.)

The principle applies whether the Member is speaking in the House of Representatives or extends his remarks outside of that Chamber, *United States* v. *Thomas Johnson*, *supra*, U. S. Court of Appeals, 4 Cir., *supra;* Article 1, Section 6, U. S. Constitution. The Court in the *Johnson* case quotes from *Coffin* v. *Coffin*, 4 Mass. 1, as follows: "I do not confine the Member to his presence in the House; and I am satisfied that there are cases in which he is entitled to this privilege when not within the walls of the representatives' chambers."

Those who are the objects of abusive speeches may claim that there was an unworthy purpose, but that does not

vitiate the privilege. Justice Frankfurter in *Tenney* v. *Brandhove*, 341 U. S. 367, states as follows:

> "*The claim of an unworthy purpose does not destroy the privilege.* Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher* v. *Peck*, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned." 341 U. S. 367, 377. (Emphasis added.)

Good faith or bad faith of the Member making the speech is immaterial. *Cochran* v. *Couzens*, 42 F. 2d 783 (D. C. Cir.), *cert. denied*, 282 U. S. 874. The Court in the *Cochran case* stated:

> "It is manifest that the framers of the Constitution were of the view that it would best serve the interests of all the people if members of the House and Senate were permitted unlimited freedom in speeches or debates. The provision to that end is, therefore, grounded on public policy, and should be liberally construed. Presumably legislators will be restrained in the exercise of such a privilege by the responsibilities of their office. Moreover, in the event of their failure in that regard, they will be subject to discipline by their colleagues." 42 F. 2d 783, 784.

It is not rational to contend that, because the statements were repeated on television Petitioner had lost his privi-

lege. There is no relevant difference between communication of Congressional speeches by the printed pages of the Congressional Record and communication of them through the facilities of television. The fact that the substance of the matter given on the television program was precisely the same as that stated to the Congress indicates that Petitioner had remained within the bounds of his privilege, and a state libel law cannot limit the performance of Congressional duties.

Conclusion.

WHEREFORE, Petitioner urges the grant of this petition, not solely that justice be done in his case, but that the law may be more truly ascertainable in all cases such as his.

HENRY R. WILLIAMS
GEORGE D. COVINGTON
Attorney for Petitioner.

APPENDIX.

Per Curiam Opinion of the Court of Appeals.

BE IT REMEMBERED, that on the 16th day of April in the year of our Lord one thousand nine hundred and sixty-four, Adam Clayton Powell, Jr., the appellant—in this cause, came here unto the Court of Appeals, by Chance & Mitchell, his attorneys and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the first Judicial Department. And Esther James, the respondent—in said cause, afterwards appeared in said Court of Appeals by Raymond Rubin, her attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals, this cause having been submitted, after due deliberation had thereon, did order and adjust that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Judgment of the Supreme Court of the State of New York, County of New York.

Adam Clayton Powell, Jr., the above named defendant, having appealed to the Court of Appeals from an Order of the Appellate Division, First Department, entered in the office of the Clerk of said Appellate Division on the 15th day of March, 1964 which Order modified and affirmed as modified a judgment entered in the Office of the Clerk of the County of New York on the 5th day of April, 1963, in favor of the plaintiff and against the defendant in the sum of $46,739.35, and the Court of Appeals having by an Order

entered in the office of the Clerk of said Court of Appeals on the 10th day of July, 1964, having affirmed the said Order of the Appellate Division with costs to the plaintiff; and a remittitur of the Court of Appeals having been duly filed herein;

Now, on motion of Raymond Rubin, Esq. attorney for the plaintiff herein; it is

Adjudged, that the Order of the Appellate Division, First Department, dated the 5th day of March 1964, be and the same hereby is in all things affirmed; and it is further

Adjudged that the plaintiff, Esther James, residing at 1744 Amsterdam Avenue, New York, New York, do recover of the defendant, Adam Clayton Powell, Jr., residing at 2368 Seventh Avenue, New York, the sum of $293.92 costs for disbursements as tax, and that plaintiff have execution therefor.

Signed and entered this 20th day of July, 1964.